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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCI COMMUNICATIONS CORPORATION AND MCI TELECOMMUNICATIONS CORPORATION,

Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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July 11, 1983

QUESTIONS PRESENTED

The court of appeals affirmed jury findings that AT&T engaged in a nationwide scheme with specific intent to exclude MCI from the long distance telephone market in violation of the Sherman Antitrust Act.[1] However, the court of appeals reversed the jury's finding that selective price cutting was part of the scheme. The court ruled that price cutting had to be considered separately from all other evidence of anticompetitive intent and could not be deemed predatory unless the reduced price was below the defendant's "long-run incremental costs." Although finding that AT&T's remaining anticompetitive practices were sufficient to stunt MCI's growth, the court directed a new damages trial at which MCI's proof of damages is to exclude any possible effects of AT&T's pricing.

The court of appeals' decision presents these questions:

1. To find predatory pricing part of a monopolist's scheme, may the jury consider all relevant evidence of anticompetitive intent, or is it restricted to a cost formula?

2. When the monopolist's illegal practices concededly crippled the plaintiff's business, is a damages retrial necessary to guarantee that no practice found lawful on appeal contributed to the recovery?

3. Should this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), requiring a plaintiff to show injury of the type the antitrust laws were designed to prevent, be interpreted to impose a new and more difficult standard for proving the amount of an injured plaintiff's lost profits?

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[1] Defendant American Telephone and Telegraph Company is referred to throughout the petition as "AT&T." Plaintiffs MCI Communications Corporation and MCI Telecommunications Corporation are referred to as "MCI."

STATEMENT REQUIRED BY RULE 28.1

Petitioners MCI Communications Corporation and MCI Telecommunications Corporation were plaintiffs, appellees and cross-appellants below on the issues presented for review.

MCI Communications Corporation is the parent corporation of MCI Telecommunications Corporation. MCI Communications Corporation has no parent corporation. Neither MCI Communications Corporation nor MCI Telecommunications Corporation has any subsidiary which is not wholly owned.

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, MCI Communications Corporation and MCI Telecommunications Corporation, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered on January 12, 1983.

OPINIONS BELOW

The opinion of the court of appeals is reprinted at 1982-83 Trade Cas. (CCH) ¶ 65,137 and appears beginning at page 1a of the separately bound Appendix.[2] The jury's general and special verdicts appear at pages 234a-37a of the Appendix.

[2] References to the opinion of the court of appeals majority appear throughout the petition as "Op., App." and references to the dissenting opinion appear as "Dissent, App.", followed by the relevant page number of the Appendix. References to the special verdict appear as "S.V.", followed by the special verdict number and the relevant page number of the Appendix. Transcript references and references to MCI's exhibits appear as "Tr." and "PX"

(footnote continued on next page)

The judgment of the district court appears at page 238a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1983. (App. 240a.) MCI's timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on April 11, 1983. (App. 241a.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

Section 4 of the Clayton Act, 15 U.S.C.A. § 15 (West Supp. 1983), provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(footnote continued from preceding page)

respectively, followed by the page number of the transcript or the exhibit number.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

MCI was the pioneer long distance telephone competitor of AT&T, the world's largest corporation. To enter a market that was rapidly approaching $10 billion in annual sales, MCI raised start-up capital of over $100 million. (Op., App. 12a; PX 953.) AT&T's top executives saw the seriousness of MCI's challenge and took a number of steps to preserve AT&T's market dominion.

AT&T decided to use its virtually absolute power over local telephone facilities to stop MCI. (PX 273B at 1124-25, 1211-12; Tr. 2186, 2188-89.) Although MCI was constructing its own long distance communications system, to reach customers it needed local telephone connections from AT&T's "Bell System" subsidiaries. (Op., App. 84a, 87a.) For many months, AT&T negotiated in bad faith concerning connections as MCI was building its system. Then, as MCI sought to begin service, AT&T broke off negotiations and denied the connections. (Op., App. 13a-14a, 136a-38a.) To impair MCI's legal redress, AT&T filed sham tariffs with forty-nine state agencies it knew lacked jurisdiction. (Op., App. 13a-14a, 133a-34a, 136a.) It later abruptly disconnected many MCI customers. (Op., App. 15a-16a, 110a-11a.) When ordered to connect, AT&T knowingly furnished inadequate connection equipment and procedures. (Op., App. 120a-23a.) While AT&T's actions spoke louder than words, AT&T's top executives frankly discussed their attitude toward MCI, using words such as:

> You bastards are not going to take away my business.

* * *

> Large amount of revenues vulnerable which we can preserve if we choke off now. I think you have to hit the nails on the head.
>
> * * *
>
> [A]ct now rather than wait until they have going business which regulators might not permit us to dislodge.

(PX 889 at 0434-35; Tr. 1848-52; Dissent, App. 190a n.18.)

AT&T also used its power over prices against MCI. After years of maintaining much higher prices, AT&T announced it would undercut MCI on routes the new carrier planned to serve and raise prices elsewhere. (Op., App. 18a-19a and n.19; Dissent, App. 190a-92a.) AT&T's new prices generated annual revenues many millions of dollars short of covering AT&T's costs as reported to federal regulators. (Tr. 10473-78; PX 3915; Dissent, App. 188a.) AT&T advisers stated that the arbitrarily chosen rates "did not seem to be cost justified." (PX 2962; PX 961; Dissent, App. 190a.) During a discussion of AT&T's pricing strategies, a top AT&T executive asked rhetorically: "How many MCIs will proceed with construction plans if we file matching rates now? A big fat zero." (PX 889 at 0435; Tr. 1851.)

A top-level AT&T report confirmed that AT&T "tactics" were "directed toward delaying or obstructing the entry of others into what has been our business." (PX 273B at 1124.) AT&T analyzed the antitrust risks created by its conduct and chose to treat antitrust liability just as "any other business risk." (PX 273B at 1081.)

AT&T's actions had their intended effect. Because AT&T's refusal to provide local connections made realization of revenues uncertain, MCI deferred construction of facilities linking over half the cities it had planned initially to serve and laid off nearly a third of its employees. (Op., App. 19a, 108a.) To keep itself alive, MCI had to divert millions in construction loan proceeds to working capital. (Op., App. 19a.) Several years later, after regulators and courts had forced

AT&T to connect and revenues had begun to mount, MCI finally completed its basic national system and ultimately became a highly profitable and successful enterprise.

In 1974, MCI filed this action principally under Section 2 of the Sherman Act, 15 U.S.C. § 2, alleging jurisdiction under 15 U.S.C. §§ 4, 15 and 26 and 28 U.S.C. § 1337. In 1980, the action was tried to a jury, at AT&T's instance. (Tr. May 16, 1979 at 3, 9-10; Tr. Dec. 3, 1979 at 7-9.) The jury found that AT&T engaged in the above-described connection and pricing practices with specific intent to exclude MCI from the market.

MCI did not claim specific losses from particular connection denials or from price cutting. Indeed, MCI offered uncontested evidence that separating the effects of AT&T's practices was not feasible. (Tr. 430-31; Dissent, App. 198a.) Therefore, MCI compared its actual performance as a damaged company after the cutbacks with its previously projected performance. (Op., App. 140a; PX 1202.) The projected performance was derived from MCI's actual business plans, which had been reviewed by the sophisticated financiers who backed MCI. (Op., App. 12a.) The projections were adjusted downward at trial to account for price competition and for delays and uncertainties not fairly attributable to AT&T. (Op., App. 20a n.20, 140a; Dissent, App. 204a-05a.) MCI offered evidence showing the feasibility and cost of meeting these projections. (Dissent, App. 204a-08a; Tr. 2199-200, 2795-820, 2817-19; PX 1202 §§ II, III.) MCI claimed a maximum of $1.49 billion in pretax lost profits over a twenty-year period. (Tr. 3557-62; PX 1707; Instruction 54, App. 231a-32a.) AT&T did not offer any alternative damage calculation. (Dissent, App. 199a and n.22.) The jury awarded $600 million in damages before trebling. (App. 237a.)

The court of appeals unanimously affirmed AT&T's liability. The court upheld the jury's findings that the connection practices constituted willful maintenance of a monopoly in violation of Section 2 of the Sherman Act. (Op., App. 87a-

88a, 100a, 102a, 110a, 113a, 120a, 134a-38a.) The court also agreed with the jury that "the denial of interconnection and MCI's consequent entry into the market on a reduced scale were sufficient to substantially harm MCI," satisfying the Clayton Act's requirement that the plaintiff show injury to his business or property. (Op., App. 108a-09a.)

However, the majority of the court of appeals panel vacated the jury's finding on price cutting and remanded for a new trial limited to the amount of damages. The majority held that price cutting by a monopolist who faces a competitive challenge should be encouraged. (Op., App. 46a-49a.) Therefore, it was error to permit the jury to consider evidence of the defendant's actual intent in cutting prices or the defendant's other contemporaneous conduct which might shed light on that intent. (Op., App. 49a, 66a n.58.) The sole criterion for evaluating price cutting, according to the majority, was whether the price was below the defendant's "long-run incremental cost," a fact not shown. (Op., App. 49a, 66a and n.58.) While MCI had not claimed that price cutting had increased the amount of the damages, the majority reasoned that *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), requires the plaintiff to show that "damages reflect only the losses directly attributable to *unlawful* competition." (Op., App. 141a-42a (emphasis in original).) Noting that MCI did not offer "evidence on the adjustment of the damage award to reflect findings of non-predation," the court rejected MCI's proof of the amount of damages. (Op., App. 148a-49a.)

The majority acknowledged that MCI was not required to "disaggregate" its damages by assigning discrete amounts of damage to each of AT&T's acts. (Op., App. 120a-21a n.106, 142a, 155a.) Nevertheless, the majority reversed because MCI did not submit proofs which anticipated, and somehow specifically eliminated the impact of, any AT&T act the reviewing court might later determine to have been lawful. (Op., App. 146a.)

REASONS FOR GRANTING THE WRIT

The jury found, and the court of appeals agreed, that AT&T abused its monopoly power on a massive nationwide scale to exclude an aggressive competitor from the market. The jury and reviewing court also agreed that AT&T's abuse of power stifled MCI's growth. However, contrary to this Court's decisions, the court of appeals severed consideration of predatory price cutting from the defendant's overall monopolistic scheme and treated price cutting as if it were a separate, highly technical statutory violation. The court flatly admitted it was imposing a restrictive test to encourage monopolists' price cutting as an advance of enlightened economic theory over traditional Sherman Act constraints. (Op., App. 46a-49a and n.40.) The court also shifted from the defendant to the plaintiff the burden of proving that the defendant's lawful conduct did not contribute to the damages. (Op., App. 141a-42a.)

The Seventh Circuit's "long-run incremental cost" test conflicts with decisions of the other circuits, which themselves are badly split. The circuits are also split on the standards for proof of lost profits. Antitrust litigation, often involving millions of documents, hundreds of depositions, years of preparation and months of trial, should not remain subject to these uncertainties. Uncertain enforcement, as exemplified by this already drawn-out case, will encourage other large firms to respond to competition as AT&T did, not with new products or more efficient services but with the raw use of market power.

I. THIS COURT SHOULD END A SERIOUS CIRCUIT CONFLICT BY REJECTING ARTIFICIAL LIMITS ON PROOF OF PREDATORY PRICING.

Predatory pricing is a familiar economic occurrence, and, until recently, the law on this subject has been uncomplicated. One of the tactics used by monopolists who intend to destroy smaller competitors or new entrants is to target price reductions in the particular product or geographic area where a competitor is active. The monopolist meanwhile sets other prices at a higher level. Rarely is the price reduction the only alleged anticompetitive act, and rarely is it sought to infer predatory intent solely from the reduction. More often, as in this case, the price reduction is only part of a pattern of predatory practices, and other evidence exists to prove that the defendant intends to destroy its rival and maintain its monopoly.

This Court has considered selective price cutting to be part of a predatory scheme without analyzing costs.[3] The Court has also condemned "below cost" pricing or sales at a loss without prescribing a particular mode of proof.[4]

Recently, however, the lower federal courts have become hopelessly bogged down in trying to set precise rules for predatory pricing. Professors Philip Areeda and Donald Turner started the movement with their proposal that prices be conclusively presumed lawful if they exceed marginal cost. Areeda and Turner encouraged the courts to determine the lawfulness of price cutting in a vacuum and to disregard evidence of the defendant's other anticompetitive conduct and intent. Areeda and Turner, *Predatory Pricing and Related*

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[3] *See United States* v. *Grinnell Corp.*, 384 U.S. 563, 570, 576 (1966); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 43, 74-76 (1911).

[4] *See Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 698-99 (1967); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 804-08 (1946); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 160-61 (1911).

Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 699-700, 711, 732-33 (1975).

The courts of appeals are in sharp disagreement concerning this issue. The Second Circuit has unqualifiedly adopted the Areeda and Turner proposal.[5] The Ninth Circuit[6] and the Sixth Circuit[7] have rejected it and permit consideration of evidence of other conduct and intent apart from costs.

The Fifth Circuit appears to have adopted the Areeda-Turner test, at least in some circumstances.[8] The Third Circuit has said in dictum that it is inclined to accept the basic premise of the Areeda-Turner test.[9] The First Circuit has used a "short-run out-of-pocket costs" test.[10] However, the Tenth Circuit has refused to adopt a solely cost-based test, while considering the Areeda-Turner analysis "extremely valuable."[11] The Fourth Circuit has employed a

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[5] *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 87-88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

[6] *Transamerica Computer Co.* v. *IBM Corp.*, 698 F.2d 1377, 1386-88 (9th Cir. 1983); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1033-37 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57-58 (1982).

[7] *Borden, Inc.* v. *FTC*, 674 F.2d 498, 513-16 (6th Cir. 1982), *vacated and remanded mem.*, 103 S. Ct. 2115 (1983); *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F 2d 818, 824 n.6 (6th Cir. 1982).

[8] *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723-24 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

[9] *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340, 352 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

[10] *Americana Industries, Inc.* v. *Wometco de Puerto Rico, Inc.*, 556 F.2d 625, 627-28 (1st Cir. 1977).

[11] *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 795-97 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

"reasonable expectation of profit" test,[12] and the Eighth Circuit has recognized that prices above marginal costs can be predatory.[13]

The Seventh Circuit in this case employed still another standard, conclusively presuming prices to be lawful if they exceed "long-run incremental costs." (Op., App. 66a and n.58.)[14] To add to the confusion, the Seventh Circuit thought long-run incremental cost was a measure of average total cost, although both parties and the trial judge had treated it as a measure of marginal cost. (Op., App. 43a n.38, 50a-51a, 61a n.54; Dissent, App. 173a-74a n.5.)

This Court's intervention is required to halt the disarray among the circuits on this question. Lengthy and complicated antitrust trials should not be going forward throughout the country under the existing pall of confusion and uncertainty.

To solve this problem, the Court should declare, in line with its past decisions, that it will not prescribe an economic cost standard for predatory pricing.[15] Where price cutting is just one of many acts the defendant has taken to exclude a competitor, the legality of the price cutting should be judged in the context of the defendant's intent and overall scheme. Economic evidence may well be useful in evaluating the defendant's intent, but not to the exclusion of all other evidence.

The Areeda-Turner and Seventh Circuit cost rules place too much reliance on a process that has no claim to be " 'an

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[12] *Greenville Publishing Co.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 396-98 (4th Cir. 1974).

[13] *SuperTurf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981).

[14] *But see Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980).

[15] *See supra* notes 3 and 4, at 8.

exact science.' " *National Association of Greeting Card Publishers* v. *United States Postal Service*, 51 U.S.L.W. 4877, 4881 (U.S. June 22, 1983) (quoting authority). Marginal cost is "not readily ascertainable from any corporate book of account." *Richter Concrete Corp.* v. *Hilltop Basic Resources, Inc.*, 547 F.Supp. 893, 908 (S.D. Ohio 1981), *aff'd sub nom. Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir. 1982). Long-run incremental cost, which measures only anticipated costs, is equally subject to manipulation.[16] Economic experts, retained after litigation is filed, reconstruct cost analyses which the monopolist never dreamed of when he made the challenged price reductions. These analyses are essentially irrelevant to the issue of whether the monopolist acted willfully to maintain his monopoly.

The elevation of an imprecise economic theory to the level of binding legal doctrine defeats the purposes of the Sherman Act and can lead to absurd results, as this one-count monopolization case illustrates. The jury found, on ample evidence, that AT&T engaged in an extensive scheme to drive MCI out of business and maintain AT&T's monopoly. (S.V. 5, App. 235a-37a; Op., App. 87a-88a, 100a-02a, 108a-09a, 110a-11a, 120a-23a, 133a-38a.) One facet of this scheme was selective price cutting. (S.V. 5(n), App. 236a.) The court of appeals reversed on pricing, not because it doubted the existence of AT&T's exclusionary scheme or the intended part of pricing in that scheme, but because a study performed during the litigation indicated that the prices were above "long-run incremental cost." Then, says the court of appeals, MCI's damage award must be vacated because it may have indirectly included the intentionally harmful impact of the immunized predatory price. This type of reasoning treats antitrust courts as " 'impregnable citadels of technicality' "

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[16] *See Aeronautical Radio, Inc.* v. *FCC*, 642 F.2d 1221, 1229-30 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920, 976 (1981), *aff'g In re AT&T, Revisions of Tariff FCC No. 260, Private Line Services, Series 5000 (TELPAK)*, 61 F.C.C. 2d 587, 628-33 (1976).

instead of protectors of our "economic freedom." *United States* v. *Hasting*, 103 S. Ct. 1974, 1980 (1983) (quoting authority); *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 103 S. Ct. 897, 909 and n.38 (1983).

In the now-discredited *Lochner* era, this Court's reliance on an economic theory of the time elicited Justice Holmes' famous rebuke: the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). It is equally clear that the Sherman Act did not enact the views of today's academic economists who espouse "an economic theory which a large part of the country does not entertain." *Id.* No one academician's view of predatory pricing was "imparted to him on Sinai." *American Federation of Labor* v. *American Sash & Door Co.*, 335 U.S. 538, 543 (1949) (Frankfurter, J., concurring). Economic theories may supplement but not supplant the "rich history" of antitrust jurisprudence. (Dissent, App. 174a-78a.)

II. THIS COURT SHOULD REJECT IMPRACTICAL BURDENS FOR PROVING ANTITRUST DAMAGES.

The rules governing awards of antitrust damages to injured competitors grew out of both the practical limits of conducting jury trials and the need to enforce the antitrust laws. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 565-67 (1981); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699-701 (1962); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 263-65 (1946). The competitor usually complains that the defendant's violations have excluded him from the market. The plaintiff has lost sales and market penetration, and damages are usually measured by the plaintiff's lost profits. The defendant asserts that even if the plaintiff had met with no anticompetitive acts, his own mismanagement, lawful competition or industry conditions would have reduced or eliminated his profits.

These defenses create practical problems of proof because "[t]he vagaries of the marketplace . . . deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co.* v. *Chrysler Motors Corp., supra*, 451 U.S. at 566. As a result, this Court has required the lower courts to

> observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

Zenith Radio Corp. v. *Hazeltine Research, Inc., supra*, 395 U.S. at 123.

The same principles apply when a plaintiff has been intentionally excluded from the market by a variety of practices. This Court has held that, where lawful practices may have exacerbated the impact of unlawful practices, the plaintiff may recover for the combined effect of all the practices. *Bigelow* v. *RKO Radio Pictures, Inc., supra*, 327 U.S. at 262-63. This rule preserves the plaintiff's "right, to continue [to compete] free of the restraints of the unlawful [practices]." 327 U.S. at 262. "[T]he wrongdoer shall bear the risk of the uncertainty which his own wrong has created." 327 U.S. at 265.[17]

Despite the principles laid down in these cases, the Seventh Circuit apparently felt that this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), required reversal of the damages award. (Op., App. 140a-42a.) In *Brunswick*, this Court held that an unlawful acquisition of a failing company did not cause compensable injury to

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[17] *See also Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). *Cf. Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979) (the treble damage remedy is critical to deterring antitrust violations).

competitors of the acquired firm. 429 U.S. at 487-88. Plaintiffs' injury came from the preservation of competition. 429 U.S. at 488. Therefore, the plaintiffs could not establish liability under the private action provisions of Section 4 of the Clayton Act. *See also Blue Shield of Virginia* v. *McCready*, 102 S. Ct. 2540, 2550 (1982). In this case, the court of appeals found that substantial injury had been caused by AT&T's illegal acts. (Op., App. 88a, 108a-09a, 111a, 120a-23a and n.106, 136a-37a, 138a.) This injury fully satisfies *Brunswick*. The stunting of MCI's growth as a result of AT&T's connection denials is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, *supra*, 429 U.S. at 489.

The Seventh Circuit extended the *Brunswick* holding beyond antitrust injury to calculation of the amount of damages. Despite MCI's substantial injury, the court would require MCI to establish that AT&T's illegal connection practices are the sole cause of any claimed lost profits and that each dollar of the recovery flows from the unlawful quality of AT&T's acts. (Op., App. 141a-42a, 145a, 155a.) This reading of *Brunswick* would overrule *Bigelow* and other cases permitting reasonable estimates of the amount of damages once fact of injury has been established.

The Seventh Circuit's decision and similar interpretations of *Brunswick* by the Second and Ninth Circuits[18] conflict with recent decisions of the Fourth Circuit. That Circuit expressly rejected the argument that the *Brunswick* "injury" test can be applied to the amount of damages. *Hospital Building Co.* v. *Trustees of Rex Hospital*, 691 F.2d 678, 689-90 (4th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3738 (U.S. April 6, 1983) (No. 82-1633), *cross-petition for cert. filed*, 51

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[18] *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Handgards, Inc.* v. *Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), *on remand*, 552 F. Supp. 820 (N.D. Cal. 1982).

U.S.L.W. 3807 (U.S. April 28, 1983) (No. 82-1762) (cross-petition presenting *Brunswick* issue); *Lee-Moore Oil Co.* v. *Union Oil Co.*, 599 F.2d 1299, 1302-04 (4th Cir. 1979).

The Seventh Circuit misreads *Brunswick* to require a laboratory test of how well MCI would have done in the market if AT&T had not denied connections. The answer provided by this Court's opinions is that if AT&T wanted a marketplace test of the efficiencies of the two companies, it should not have engaged in illegal conduct toward MCI sufficient to prevent this test. MCI's proof met the burden of fairly accounting for competitive factors and industry conditions beyond AT&T's control. This Court's opinions do not afford an adjudicated lawbreaker like AT&T the solicitude extended by the Seventh Circuit.

Besides undercutting decades of this Court's decisions on private antitrust enforcement and aggravating a conflict in the circuits, the Seventh Circuit's decision will prove to be administratively unworkable. A plaintiff who has suffered market exclusion after the defendant has engaged in a variety of acts does not know which acts will be found unlawful. Even after verdict, jury findings evaluating these acts may be vacated. The plaintiff who cannot attribute specific amounts of damage to specific acts submits damage proofs on the assumption that all the defendant's alleged misconduct will be held wrongful. The jury is then free to make adjustments consistent with the evidence, as did the jury in the instant case. *See Eastman Kodak Co.* v. *Southern Photo Materials Co.*, *supra*, 273 U.S. at 379; *cf. Story Parchment Co.* v. *Paterson Parchment Paper Co.*, *supra*, 282 U.S. at 566.

The Seventh Circuit's approach will prevent ordinary jury trials. The requirement that the plaintiff trace damages solely to wrongful conduct cannot be met until the courts have finally determined which conduct is wrongful. Then, if some part of the liability finding has been undermined on appeal, the Seventh Circuit mandates a damages retrial. The only way for a plaintiff to avoid this dilemma is to insist upon

a bifurcated trial and an interlocutory appeal after the liability phase of the trial.

Bifurcated trials interrupted by interlocutory appeals of already complex monopolization cases would defeat "the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *Associated General Contractors, Inc.* v. *California State Council of Carpenters, supra*, 103 S. Ct. at 911.

The award in this case did not justify the Seventh Circuit's departure from the usual manner of handling antitrust trials and reviewing jury verdicts. (*See, e.g.*, Op., App. 66a n.58, 71a-75a, 147a-49a, 150a-52a; Dissent, App. 188a-90a, 192a-93a, 200a n.23, 203a-08a and n.30.) *See Eastman Kodak Co.* v. *Southern Photo Materials Co., supra*, 273 U.S. at 379; *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946); U.S. Const. amend. VII.

This Court should grant the petition, to restore proper emphasis on the deterrent effect of the Sherman Act and to reject the unworkable procedures implicit in the Seventh Circuit's approach.

CONCLUSION

For the reasons stated, the Court should grant MCI's petition for a writ of certiorari, reverse that portion of the judgment of the Seventh Circuit that reverses and remands for a damage trial, and direct affirmance of the judgment of the district court.

Respectfully submitted,

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